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The Infield Fly Rule and the Internal Revenue Code: An Even Further Aside

Mark W. Cochran

THE INFIELD FLY RULE AND THE INTERNAL REVENUE CODE: AN EVEN FURTHER ASIDE

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Life,[1] we are told, imitates the World Series.[2] This *Even Further Aside*[3] tests the validity of that premise by exploring certain similarities and differences between the Official Baseball Rules[4] and rules of somewhat broader application. Specifically, this *Even Further Aside* will compare baseball's infield fly rule[5] with functionally similar provisions of the Internal Revenue Code[6] in order to

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1. On the meaning of life, or more specifically on the problem of defining the commencement thereof, see Roe v. Wade, 410 U.S. 113, 129-152 (1973). *Cf.* Welch v. Helvering, 290 U.S. 111 (1933), in which Justice Cardozo suggested that "[l]ife in all its fullness must supply the answer to the riddle" of which business expenses are "ordinary and necessary" and therefore deductible. *Id.* at 115.

2. T. BOSWELL, HOW LIFE IMITATES THE WORLD SERIES (1982). A. Bartlett Giamatti, president of the National League of Professional Baseball Clubs, has been quoted as saying that baseball "is more than just a sport. It is life itself." Chadwick, *Baseball's Academician*, AM. WAY, June 15, 1987, at 46. Although Mr. Giamatti's statement raises interesting philosophical issues, this *Even Further Aside* will pursue Mr. Boswell's more conservative assertion. The premise that life imitates baseball is, of course, a variation on the familiar truism that life imitates art (and vice versa). If life imitates both art and baseball, does it follow that baseball imitates art? Apparently not, according to the United States Court of Appeals for the Ninth Circuit. In Wills v. Commissioner, 411 F.2d 537 (9th Cir. 1969), the court held that a famous baseball player could not exclude from his gross income the value of awards he had received by claiming they were awards for "artistic achievement." *Id.* at 542.

3. *See* Flynn, *Further Aside: A Comment on "The Common Law Origins of The Infield Fly Rule,"* 4 J. CONTEMP. L. 241 (1978); *Aside: The Common Law Origins of the Infield Fly Rule*, 123 U. P. L. REV. 1474 (1975) [hereinafter *Aside*]. *Cf.* G. LARSON, THE FAR SIDE (1982).

4. COMMISSIONER OF BASEBALL, OFFICIAL BASEBALL RULES (1984). [hereinafter BASEBALL RULES].

5. *Id.* rules 2.00, 6.05(e). Rule 6.05(e), which provides that a batter is out when he hits an infield fly, is the operative rule. Rule 2.00 defines the term 'infield fly' as "a fair fly ball (not including a line drive nor an attempted bunt) which can be caught by an infielder with ordinary effort, when first and second, or first, second, and third bases are occupied, before two are out." *Id.* rule 2.00.

6. 26 U.S.C. §§ 267, 482 (1982).

determine the extent to which the national pastime[7] mirrors other human endeavors.

The infield fly rule can best be understood by considering its purpose: "[t]o prevent the defense from making a double play by subterfuge, at a time when the offense is helpless to prevent it, rather than by skill and speed."[8] For example, assume that the team at bat has runners on first and second with one out. The batter pops up to the third baseman. Thinking the third baseman will catch the pop up, the base runners do not advance.[9] The third baseman, however, allows the ball to fall to the ground, picks it up, touches third base to force out the runner from second, and throws the ball to the second baseman, who touches second base to force out the runner from first. Thus, a routine pop up has been converted into a double play.

The infield fly rule prevents this type of manipulation. In the situation described, the batter would be out, regardless of whether the ball was caught. The base runners would be free either to stay on their respective bases or to advance at their own risk.[10]

The rule applies when runners are on base with less than two out and the batter hits a fly ball that, in the umpire's judgment, could be caught with ordinary effort by an infielder.[11] Once the umpire has determined that the ball is catchable and has announced the applicability of the rule, the result is automatic.[12] Absent the infield fly rule, the base runners are faced with a Hobson's choice.[14] If the runners stay on base, the infielder can let the ball drop and force a double play. If they advance, the infielder can

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7. Origin uncertain.

8. *Aside, supra* note 3, at 1477 (citing 1 H. SEYMOUR, BASEBALL 276 (1960)).

9. BASEBALL RULES, *supra* note 4. Rule 7.08(d) provides that a runner is out if "[h]e fails to retouch his base after a fair or foul ball is legally caught before he, or his base, is tagged by a fielder." *Id.* A base runner who attempts to advance on a pop fly usually can be put out easily if a fielder catches the pop fly.

10. *Id.* Rule 2.00 provides that when the batter hits an infield fly, "the ball is alive and the runners may advance at the risk of the ball being caught, or retouch and advance after the ball is touched, the same as on any fly ball." *Id.* rule 2.00.

11. *See supra* note 5.

12. *Id.*

14. "A choice without an alternative; the thing offered or nothing; so called in allusion to the practice of Thomas Hobson (d. 1631), at Cambridge, England, who let horses, and required every customer to take the horse which stood nearest the door." WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1185 (2d ed. 1934). [Note: The author

catch the ball and "double off" one or both runners.[15] Thus, the infield fly rule prevents what would otherwise be a virtually automatic double play.

The question then becomes, why *shouldn't* a pop up to the infield with runners on base result in a double play? The answer, presumably, is that the defense would gain an "unfair" advantage.[16] In baseball as in life,[17] fairness is an elusive concept that defies precise definition.[18] In this context, the "unfairness" seems to derive from the infielder's ability to manipulate a situation *without incurring any risk.* Baseball is willing to countenance one easy out when the batter pops up. To allow the infielder to convert one easy out into two easy outs would be contrary to fundamental notions of fair play.[19] In effect, the infielder would be shooting fish in a barrel.

Some commentators have suggested that the infield fly rule would be unnecessary if all players behaved as "gentlemen."[20] The suggestion may be correct, but it involves an unnecessary value judgment. Assuming the object of the game is to win,[21] can one justly vilify the infielder for capitalizing on an opportunity to get two outs instead of one? Some might even call failure to make the easy double play a dereliction of duty.[22]

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has chosen to follow a time-honored baseball tradition and omit footnote 13 out of superstition.]

15. *See supra* note 9.

16. "Fair" in this context should not be confused with "fair" as distinguished from "foul," which distinction is set out in detail in rule 2.00. BASEBALL RULES, *supra* note 4. Nor should "foul" be confused with "fowl," as discussed in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (the "sick chicken" case). *Compare* "Fair is foul, and foul is fair." W. SHAKESPEARE, *Macbeth*, Act I, Scene I, in IX THE WORKS OF SHAKESPEARE 165 (C. Herford ed. 1903).

17. *See supra* note 1.

18. *See supra* note 16.

19. *Cf.* Duncan v. Louisiana, 391 U.S. 145, 172 (1968) (Harlan, J., dissenting) (construing the due process clause of the fourteenth amendment as requiring fundamental fairness).

20. *Aside, supra* note 3, at 1478-79; *see, e.g.*, Pete Rose; *cf.* Kirby, *The Year They Fixed the World Series*, A.B.A.J., Feb. 1, 1988, at 64 (describing the scandal surrounding the alleged "fixing" of the 1919 World Series by the Chicago White Sox).

21. With respect to football, Vince Lombardi said, "Winning isn't everything, it's the only thing." J. BARTLETT, FAMILIAR QUOTATIONS 925 (15th ed. 1980). Leo Durocher said that in baseball, "[n]ice guys finish last." *Id.* at 867.

22. Such a dereliction would not be ruled an error, however. Generally, failure to make a defensive play that could have been accomplished with reasonable effort constitutes an er-

Without accusing the infielder of "unethical conduct,"[23] the observation that at least some players will take advantage of the opportunity to engage in risk-free manipulation should suffice to explain the rule's existence. For purposes of this discussion, whether this tendency is attributable to a lack of ethics or an abundance of zeal is irrelevant.

The existence of the infield fly rule demonstrates three principles. First, in certain situations, infielders are presented with the opportunity to engage in risk-free manipulation. Second, absent a rule preventing such manipulation, at least some infielders would take advantage of this opportunity. Finally, baseball perceives such manipulation as "unfair" and thus has endeavored to prevent it. At least two of these principles support the premise that baseball imitates life, and vice versa. First, life is full of opportunities for risk-free manipulation. Second, at least some people can be expected to take advantage of those opportunties.[24] To determine whether the third principle reflects a similarity between baseball and life, however, one must consider examples of society's response to risk-free manipulation.

One of the more blatant real world examples of the "manipulation without risk" phenomenon can be found in the realm of federal taxation. Like the astute infielder who sees the opportunity to convert a pop up into a double play, the taxpayer who engages in a financial transaction with a related party confronts an almost irresistible temptation to manipulate the situation. For example, assume that Owner is about to sell a property to Ownerco, a corporation. Owner owns all the stock of Ownerco. If Owner sells the property for its true value, she will realize a gain, which will increase her federal income tax liability.[25] If Owner sells the property

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ror, but for this purpose the assumption is never that the double play could be made with reasonable effort. Whether a transgression is an error is of no significance to the outcome of the game; it is relevant solely for statistical purposes.

23. *Aside, supra* note 3, at 1478.

24. *See* "playing both sides against the middle," "taking candy from a baby," "having one's cake and eating it, too," and "stacking the deck"; *cf.* "hedging one's bet," which connotes minimizing risk rather than eliminating it.

25. Generally, a taxpayer selling property will recognize a gain to the extent that the sales proceeds (the "amount realized") exceed the amount the taxpayer paid for the property (its "basis"). I.R.C. § 1001 (CCH 1988).

to Ownerco for less than its full value, she will recognize less gain or perhaps even a loss.[26]

Whether Ownerco pays full value for the property is immaterial to Owner because she owns the stock of Ownerco. To the extent that Ownerco pays less than full value, the value of Owner's stock will increase correspondingly because the corporation will have parted with less cash and acquired more property. Consequently, like the infielder who lets the pop fly drop in order to make a double play, Owner can manipulate the situation to her advantage without incurring any real cost.[27]

Federal tax law, like the rules of baseball, recognizes and responds to the "manipulation without risk" phenomenon. In Owner's case, section 267 of the Internal Revenue Code deals with the situation by denying a deduction for any loss on a sale by Owner to Ownerco.[28] As with the infield fly rule, the result under section 267 is automatic.[29] Any loss incurred on a sale to a related party is disallowed. Unlike the infield fly rule, however, section 267 is automatic in application as well as in result. The Commissioner[30] is granted no discretion in determining when the statute applies. If one of the statutorily specified relationships[31] exists, the loss is disallowed. In effect, the taxpayer is conclusively presumed to have the ability to manipulate without risk when dealing with a related party.[32] By contrast, the infield fly rule requires the umpire to exercise his or her judgment to determine whether the pop up "can be caught by an infielder with ordinary effort."[33]

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26. A loss will result if the amount realized is less than the taxpayer's basis. *Id.* The loss will be deductible if it arises out of a transaction entered into for profit, as described in I.R.C. § 165(c)(2) (CCH 1988).

27. *Cf. supra* note 24 and accompanying text.

28. I.R.C. § 267 (CCH 1988). Section 267 provides, in pertinent part, that no deduction shall be allowed in respect of any loss from the sale or exchange of property between certain related persons, including controlling shareholders and their corporations.

29. *See supra* text accompanying note 12.

30. That baseball and federal taxation both function under the supervision of a commissioner demonstrates yet another similarity between the two.

31. The statute covers sales between siblings, spouses, ancestors, or lineal descendants as well as sales between entities and parties having an interest therein. I.R.C. § 267(b).

32. Of course, this presumption is not always justified, but Congress apparently has concluded that the exceptional cases are so rare that a conclusive presumption is acceptable.

33. *See supra* note 5.

A finding that an infielder can catch a pop up with ordinary effort is a justifiable prerequisite to the application of the infield fly rule, because the opportunity for manipulation does not exist unless the infielder can choose between catching the ball and letting it drop. If a pop up would require more than ordinary effort to catch, any resulting double play would be a legitimate product of "skill and speed"[34] rather than the spoils of risk-free manipulation.

By analogy, section 267 arguably should require a determination either that the sale between related parties is an unfair bargain or that the seller has retained an indirect interest in the property. Such a finding is not required, however, probably in order to avoid the litigation that inevitably would follow.[35] The Commissioner's[36] findings of fact, unlike those of the umpire, are reviewable.[37] Thus, the absence of a fact-finding requirement in section 267 promotes efficiency by avoiding litigation of factual questions. In baseball, on the other hand, a factual requisite to the application of a rule is workable because the umpire is the ultimate finder of fact.[38]

The availability of judicial review of factual findings in federal tax matters, and the lack thereof in baseball, reflects a difference in the nature of the respective fact-finding processes, which in turn reflects a difference in the activities themselves. In baseball, the umpire is present for every play and makes a finding of fact with respect to every transaction.[39] This is possible because baseball consists of a series of discrete transactions occurring within clearly marked boundaries. Consequently, each play can be evaluated independently. By contrast, real life is a continuous, evolutionary se-

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34. *See supra* text accompanying note 8.

35. *But see infra* note 48 and accompanying text, discussing I.R.C. § 482.

36. *See supra* note 30.

37. An umpire's application of a rule may be protested, but factual determinations by the umpire are final. BASEBALL RULES, *supra* note 4, rule 4.19. *But see infra* note 57 regarding the now infamous "pine tar game."

38. BASEBALL RULES, *supra* note 4, rule 4.19.

39. The umpire's omniscience as fact finder is illustrated by the following colloquy, of unknown origin:

> Umpire No. One: "I call 'em like I see 'em."
>
> Umpire No. Two: "They ain't anything until I call 'em."

Bill Klem, a former major league umpire, is credited with saying, "I never called one wrong." In view of the finality accorded the unpire's decisions, it is hard to argue with Klem's claim. *Cf.* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final").

ries of events that are related in ways not always readily evident. These events transpire not between chalk lines but in countless boardrooms, back alleys, and business establishments.[40] The Commissioner cannot possibly make factual determinations with respect to more than a small fraction of the transactions that occur.[41] Because the Commissioner makes findings of fact in only a small number of cases, judicial review of those findings is at least feasible.[42] In baseball, in which every play involves a finding of fact by the umpire, review of fact findings would be unworkable. Games would be have to be suspended pending the resolution of factual disputes, or else they would have to be replayed.[43] When a schedule must be completed, a prompt and final determination is as important as a correct determination.[44]

The Commissioner's inability to be present at the time of a taxable transaction, together with the impossibility of investigating more than a small number of tax returns, creates a climate conducive to manipulation.[45] Particularly when related business entities engage in transactions with one another, taxpayers face a great temptation to arrange those transactions, at least superficially, in a manner that yields an advantageous tax result.[46] Section 267, which deals specifically with sales of property, reaches only a narrow segment of the manipulation-without-risk problem inherent in such transactions. In fact, no statute could adequately address all

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40. *See, e.g.*, Blanche E. Lane, 25 Tax Ct. Mem. Dec. (P-H) ¶ 56,209 (1956) (profits from prostitution are includible in gross income).

41. Overall, less than two percent of tax returns receive a full-scale audit. COMM'R & CHIEF COUNSEL, INTERNAL REVENUE SERV., 1984 ANN. REP. 13.

42. *But see* Tannenwald, *Reflections on the Tax Court*, 36 TAX LAW. 853 (1982-1983) (commenting on the Tax Court's burgeoning caseload).

43. *See infra* note 57. *Cf.* BASEBALL RULES, *supra* note 4, rule 4.19, which provides for games to be continued under protest when a manager claims that an umpire's decision is inconsistent with the rules. Professional football, on the other hand, has begun to experiment with on-the-spot review of referees' *factual* determinations. *See* Taaffe, *It's Super Ref to the Rescue*, Sports Illus. (special ed.), Sept. 3, 1986, at 160. One would hope that baseball will not lower itself to such a level. If baseball imitates football, life cannot be far behind, and when life starts to imitate football, civilization as we know it will cease to exist.

44. *See Aside*, *supra* note 3, at 1480.

45. "When the cat is away, [t]he mice will play." W. BENHAM, PUTNAM'S DICTIONARY OF THOUGHTS 870b (1930). *See supra* note 24.

46. *See* W. BENHAM, *supra* note 45, at 870b; *supra* note 24.

the possible opportunities for manipulation.[47] Instead of attempting to identify and deal with all such situations, Congress chose to endow the Commissioner with considerable discretion both to identify and to remedy manipulation by related business entities. This grant of discretion appears in section 482, which authorizes the Commissioner[48] to re-allocate gross income, deductions, credits, or allowances among business entities owned or controlled by the same interests if the Commissioner determines that such a re-allocation is necessary "in order to prevent evasion of taxes or clearly to reflect the income" of any businesses.[49]

As with the infield fly rule, a factual determination must precede the application of section 482. This factual determination is less clear cut, however, because the term "controlled" is not defined.[50] Moreover, unlike the umpire, the Commissioner is not required to exercise his or her discretion in any given case. Section 482 also differs from the infield fly rule in result. Rather than an automatic result (that is, the batter is out), section 482 authorizes a discretionary allocation of income, deductions, credits, or allowances among the various commonly controlled businesses.[51]

Because the exercise of discretion invites judicial review, efficiency necessarily is compromised when discretion is granted.[52]

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47. Virtually any business transaction is potentially susceptible to manipulation. Whenever one entity provides goods or services to a related entity, the tax effect of the transaction can be distorted by charging either more or less than the actual value of the goods or services. If the same financial interests control both entities, the amount charged is immaterial to the overall result. *See supra* notes 26-27 and accompanying text. *Cf.* "To rob Peter and pay Paul." The expression "is said to have had its origin in the reign of Edward IV when the lands of St. Peter at Westminster were appropriated to raise money for the repair of St. Paul's in London." J. BARTLETT, *supra* note 21, at 160 n.2. The phrase "to robbe Peter and paie Poule" appears in JOHN HEYWOOD'S *A Dialogue of Proverbs* 120 (R. Habenicht ed. 1963).

48. *See supra* note 30. The Internal Revenue Code actually grants the authority to the Secretary of the Treasury, who delegates it to the Commissioner of Internal Revenue. I.R.C. § 482 (CCH 1988).

49. *Id.*

50. The regulations provide that "[t]he term 'controlled' includes any kind of control, direct or indirect, whether legally enforceable, and however exercisable or exercised," adding that "[a] presumption of control arises if income or deductions have been arbitrarily shifted." Treas. Reg. § 1.482-1(a)(3) (1987).

51. I.R.C. § 482. The Internal Revenue Code rarely grants discretion comparable to that allowed by section 482.

52. *See supra* text accompanying note 42.

The type of discretion granted through section 482 is necessary, however, because the Commissioner is not present at the time of the transaction and must make his or her findings after the fact.[53] An absentee fact finder invites the type of manipulation that cannot be undone by the application of fixed rules.[54] In baseball, in which the fact finder is always present, the players' conduct can be monitored more closely.

In any event, a rule giving the umpire discretion comparable to that afforded by section 482 would be unworkable.[55] Just as the umpire's findings of fact must be final, his or her discretion must be minimal.[56] Since the exercise of such discretion would be reviewable, such discretion must be granted sparingly lest the summer schedule degenerate into a litigation docket.[57] In the context

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53. *See supra* text accompanying notes 40-41.

54. *See supra* notes 45-46 and accompanying text.

55. *See supra* notes 43-44 and accompanying text.

56. *Id.*

57. A now infamous episode involving George Brett of the Kansas City Royals illustrates the potential consequences of a seemingly minor exercise of discretion by an umpire. In a game against the Yankees in New York on July 24, 1983, Brett came to bat with two out in the top of the ninth inning. The Royals were behind 4-3, and one man was on base. Brett hit a home run, putting the Royals ahead 5-4. Yankee Manager Billy Martin pointed out to the umpire that the pine tar on Brett's bat handle extended beyond the allowable limit of 18 inches. The umpire agreed with Martin, disallowed Brett's home run, and called Brett out to end the inning and the game.

Two alternate theories support the umpire's decision. First, under rule 6.06(d), a batter is out when he uses or attempts to use a bat that, *in the umpire's judgment*, has been altered or tampered with to improve the distance factor or cause an unusual reaction to the baseball. OFFICIAL BASEBALL RULES, *supra* note 4, rule 6.06(d) (emphasis added). The alternate theory for calling Brett out is based on rule 1.10(b), which, prior to 1984, provided:

> The bat handle, for not more than 18 inches from the end, may be covered or treated with any material (including pine tar) to improve the grip. Any such material, including pine tar, which extends past the 18 inch limitation, *in the umpire's judgment*, shall cause the bat to be removed from the game. No such material shall improve the reaction or distance factor of the bat.

COMMISSIONER OF BASEBALL, OFFICIAL BASEBALL RULES 1.10(b) (1983) (emphasis added).

Notwithstanding the apparent propriety of the umpire's ruling, four days later, American League President Lee MacPhail overruled the umpire's decision and allowed the home run to stand. MacPhail concluded that the pine tar had been applied to the bat to improve Brett's grip (an allowable alteration) rather than to alter the baseball's reaction to the bat (a prohibited alteration). According to MacPhail, even though the umpire's ruling was "technically defensible," Brett had not violated the "spirit" of the rule.

In light of MacPhail's decision, the game had to be resumed three weeks later. The game began where it had left off—with the Royals at bat with two out in the top of the ninth, leading 5-4. When play resumed, the Yankees alleged that Brett had failed to touch first

of section 482, on the other hand, discretion and the consequent potential for litigation are accepted as necessary evils, because no realistic alternative exists for dealing with the manipulation-without-risk phenomenon.

The finality of the umpire's findings of fact and the application of arbitrary rules instead of case-by-case discretion, when compared with tax law's provisions for judicial review and significant grants of discretion, might lead to the conclusion that baseball prefers efficiency over justice.[58] Such a conclusion, however, overlooks the fact that the participants have willingly submitted to the rules. Baseball is played in a controlled environment and is governed by agreed-on conventions. In short, baseball is a game.

Having reached that unsettling conclusion, does it follow that the original premise of this Even Further Aside is false? This author thinks not. The premise was not that life and baseball are identical, but simply that they imitate each other.[59] The existence of functionally similar manipulation-without-risk rules in baseball and federal taxation indicates that substantial similarities do exist. Baseball, like life, presents opportunities for risk-free manipulation. In baseball, as in life, some people can be expected to take advantage of such opportunities. By attempting to prevent such manipulation through written rules, baseball, like society in general, has indicated a disapproval of risk-free manipulation. The difference in operation between the infield fly rule on the one hand and sections 267 and 482 of the Internal Revenue Code on the other does not necessarily reflect a fundamental difference between

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base on his home run circuit. Martin's idea was that even if Brett *had* touched first base, the umpiring crew working the resumed game was not the same crew that had worked the original game and thus they could not determine whether Brett had touched first base on the previous play. The umpires had anticipated Martin's gamesmanship, however, and produced a notarized letter from the original umpiring crew indicating that Brett had indeed touched all the bases. The game then proceeded to an anticlimactic finish, with the last batter in the top of the ninth and the first three batters in the bottom of the ninth being retired in order.

The details of the "pine tar game" are set out in Wulf, *Pine-Tarred and Feathered*, SPORTS ILLUS., Aug. 29, 1983, at 48. For a more detailed legal analysis, see Commentary, *In re Brett: The Sticky Problem of Statutory Construction*, 52 FORDHAM L. REV. 430 (1983). For a criticism of MacPhail's action in overruling the umpire, see McCarthy, *Bad Calls*, THE NEW REPUBLIC, Aug. 29, 1983, at 9, 10-11.

58. *See supra* text accompanying note 44.

59. *Cf.* Chadwick, *supra* note 2.

baseball and real life. Rather, this difference is indicative of the fact that baseball is a controlled, condensed version of real life. As one commentator has put it more eloquently: "Baseball is to our everyday experience what poetry often is to common speech—a slightly elevated and concentrated form."[60]

60. T. BOSWELL, *supra* note 2, at 6.

NOTES

DOES SECTION 524(a)(2) OF THE BANKRUPTCY CODE BAR CRIMINAL PROSECUTION CONCERNING DISCHARGED DEBTS?

Because Congress explicitly intended section 524(a)(2) of the Bankruptcy Code[1] to prohibit *any* act to collect debts discharged in bankruptcy,[2] the provision arguably bars creditors from pursuing criminal prosecution of debtors to aid in their collection efforts. Although bankruptcy law is intended to give a debtor a fresh start, the policy of broadly construing bankruptcy laws to favor a debtor is not meant to protect the dishonest debtor.[3] Bankruptcy laws should not be a safe "haven" for criminals.[4] Thus, section 524(a)(2) presents a tension between potentially conflicting state and federal law and policies.[5] In balancing the federal bankruptcy policy of affording the debtor a fresh start with a state's right to prosecute debtors who have violated state criminal laws, courts have reached contradictory results.

State criminal prosecution of debtors to coerce collection of unpaid debts is not a recent phenomenon.[6] Commentators and judges have noted that creditors who are frustrated by the expansive discharge provisions and automatic stay of the Bankruptcy Code have

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1. 11 U.S.C. §§ 101-151326 (1982). The Bankruptcy Code comprises all of title 11 of the United States Code.

2. S. REP. No. 989, 95th Cong., 2d Sess. 80 [hereinafter S. REP. No. 989], *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5866.

3. McMillan v. Firestone (*In re* Firestone), 26 Bankr. 706, 719 (Bankr. S.D. Fla. 1982) (citing Bruning v. United States, 376 U.S. 358 (1964)).

4. *See* H.R. REP. No. 595, 95th Cong., 2d Sess. 342 [hereinafter H.R. REP. No. 595], *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6299.

5. For a thorough discussion of areas of tension between federal bankruptcy law and state law interests, see Lake, *Conflict: The Bankruptcy Act v. State Statutes*, 10 LOY. L.A.L. REV. 753 (1977).

6. *See* Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153 (1982).